RAPIAN BIN SUHAILI

v.

PUBLIC PROSECUTOR

HIGH COURT, BRUNEI DARUSSALAM
A.M. MCMULLIN JC
[CRIMINAL APPEAL NO. 8 OF 1994]
10 DECEMBER 1994

***CRIMINAL LAW**: Charge of causing death by dangerous driving - Prosecution case resting primarily on credibility of two principal prosecution witnesses - Appeal against conviction and sentence - Whether prosecution witnesses evidence can be believed - Whether appellate Court can interfere with finding of fact by trial Judge.*

The appellant was convicted in the Magistrate's Court on a charge of causing death by dangerous driving contrary to the provisions of s. 27 of the Road Traffic Act and upon conviction he was sentenced to 5 months imprisonment and disqualified from driving for a period of 2 years. He appealed against his conviction and sentence.

Held:

[1] The question of guilt or innocence rested primarily upon the credibility of the two principal prosecution witnesses. This was pre-eminently a case in which the impression of the witnesses by the sitting Magistrate was of primary importance. Inspite of the points raised by Counsel for the appellant, the Court was not persuaded that the Magistrate was mistaken and in the circumstances the appeal against conviction must be dismissed.

[2] On the appellant's request for a non-custodial sentence, there is no room on the evidence here for any alternative finding of negligence or momentary mistake such as might justify a non-custodial sentence and that appeal too must be dismissed.

[Appeal dismissed with costs].

Legislation referred to:
Road Traffic Act Cap. 68, s. 27

For the appellant - Geoffrey Sim; (M/s. Sandhu & Co.)
For the public prosecutor - Mohd Yusree

JUDGMENT

A.M. McMullin JC:

The appellant was convicted in the Magistrate's Court on a charge of causing death by dangerous driving contrary to the provisions of s. 27 of the Road Traffic Act Cap. 68 and upon conviction he was sentenced to 5 months' imprisonment and disqualified from driving for a period of 2 years. From that conviction and sentence he now appeals to this Court.

The accident out of which the charge arose occurred on 4 April 1990 on a stretch of the Tutong/Muara Highway in the vicinity of km 52.

It is not in dispute that the driver of car no. BK 5490 Tan Ah Ngun died in an accident which occurred when the car being driven by him came into collision with a car driven by the appellant, KE 4847. It is common ground that the deceased was travelling towards Kuala Belait and the defendant towards Bandar Seri Begawan at the time of the accident.

It is an extraordinary case. The contention of the prosecution has been throughout that this accident was caused by the act of the appellant who in a fit of furious anger drove his car directly across the mid line of the road into the path of the oncoming car in a deliberate attempt to inflict injury upon the young woman who was sitting beside him in the passenger seat.

The case for the prosecution rested primarily upon the testimony of that young woman, Sia Leong Ai (PW4). It appears that she had known the appellant, Rapian, since they were together in their school days at the same school. In 1989 a relationship of some intimacy had developed between them. The appellant, who was an Assistant Station Fire Officer was sent to Darwin in Australia to take a course connected with his duties as a Fire Officer. She came to visit him there and they went through some form of wedding ceremony, although he then already had a wife. This much is common ground.

Sia told the Court that when they returned to Bandar they discovered that this form of ceremony was not recognized and she said that the appellant besought her earnestly to go through a proper form of marriage ceremony to regularise their union. She was reluctant to do so, although they continued to consort with each other in a rather irregular way from time to time. She said that her parents did not know about the Australian marriage. The appellant was evidently not happy about this refusal, and according to her, on one occasion threatened to commit suicide.

She went on to tell the Court that on the night on which the accident occurred a row developed between them on this matter while they had stopped at the appellant's sister's home on their journey from Kuala Belait to Bandar. She said that the row went on for hours and that it persisted when they continued upon their journey. In the course of it, he said words to the effect that if she did not marry him he would cause the car to crash at her side so that her life would be ended. Thereafter he suddenly swerved his car across the mid line of the road into the path of the oncoming car with which it then immediately collided. The road was straight at that point and there was no other traffic. As a result of this collision she received injuries which required treatment in hospital for several weeks. She said that during this time the appellant approached her and warned her not to tell the police how the accident had been caused, threatening her with harm if she refused to obey him.

On two separate occasions thereafter she made statements by the police, the first being about one month after the accident, in neither of which, obedient to the appellant's threats, did she tell the police how the accident had occurred nor that there had been any row. In the first statement she simply said "I saw another car coming from the direction of Muara encroaching our lane and the said car came close to our car. I shouted "I am going to die". Then our car hit car and I lost my consciousness."

In a further statement she told the police "... on the way to Muara and before the accident I saw car lights coming from the opposite direction. Everything happened so fast that I did not feel or hear car braking."

Her relationship with the appellant continued after the accident and subsequently on two occasions, she visited him in Hong Kong where he had gone for further training. On this second occasion she became aware that he had taken up with a Filipino woman during his time in Hong Kong, and when she left Hong Kong with him on the aeroplane to return to Bandar this woman saw the appellant off at the airport. She admitted that she was angry about this and somewhat jealous. She said that on her return to Bandar, and being aware that the hearing of the criminal case was coming on, she felt afraid of the possibility that

she would be caught out lying in Court and consequently she sought out a lawyer on 22 September 1992 and explained her position to him and her fear of the appellant as the reason for having given false statements to the police. She put before him what she said was the true version of the matter. This was confirmed by the lawyer Mohd Yusof Shaik Abdul Halim (PW6).

This story was denied in all material respects by the appellant. According to him they had continued to live intimately if somewhat erratically and on good terms after the accident as before. There had been no row between them on the night in question and the accident was wholly the fault of the driver of the other car who had suddenly veered into the appellant's lane and come into collision with him.

The Magistrate very properly regarded Sia as a suspect witness and he sought corroboration for her story. He found this firstly in the evidence of Gregory Tan (PW7) who was a passenger sitting in the front passenger seat of the deceased's car at the time of the accident. He had been picked up at the airport at Bandar by the deceased and he was travelling with the deceased and a friend, who was in the back of the car, heading away from Bandar towards Seria when the accident occurred. He was chatting casually to the deceased before the accident and he noticed the headlights of a car coming from the opposite direction but paid little attention to them. He told the Court what happened then in these words:

> Just before the accident, the headlights from the other car came in and encroached our side then I heard a loud bang. My head hit against the dashboard. After that, I just sat in the car because I was in great pain. Then, later on, somebody came and helped us to get out of the car.

That evidence, spare as it is, unequivocally puts the blame for the accident solely upon the driver of the other car. On its own it affords firm corroboration for Sia's evidence. However, this witness had also made two statements to the police shortly after the accident. Mr Geoffrey Sim who appears for the appellant lays strong emphasis on these statements in contending that they show that this witness too was suspect and should have been so treated by the Magistrate. He emphasizes the fact that they were recorded by the police nearly four years before the trial of this criminal charge.

In the first of these statements, recorded on 18 April 1990, Tan said "as we were reaching the Kg Bukit Penggal area I saw a car coming from Tutong with its headlights on and was still far away from the car I was travelling in. When the car I was travelling in nearing the said car, the headlights of the said car was also very near and that was the time when the collision happened. I lost my consciousness after the accident." In answer to a question by the police officer he said "I do not know who was wrong in the accident."

In the second statement recorded on 7 July 1990 he said "both cars were on its own respective lanes. When both cars were very near to each other, on the verge of passing each other, I heard a collision. After that I found my head resting on the car dashboard and then I looked up. I could not move as I felt pain on my chest." In answer to further question by the police officer he said that the other car had been travelling straight towards them in its own lane but when it was about 10 feet away he saw its headlights from the right corner of his eyes. He said he was not paying close attention and was looking directly in front of him. Further on he said the car was travelling on its own lane but that the intensity of the headlights was brighter than usual and he could feel the intensity of the headlights when the car was near about 10 feet away.

It will be seen that these accounts of the matter are distinctly less positive than was the brief evidence which he gave in Court as to the manner in which the accident came about. Mr Sim further asks me to say that this witness had a special interest to serve in stiffening his evidence in this way since he was subsequently a plaintiff in a Civil Action arising out of the same accident. However, I do not think it would be proper for me to take any account of that, especially in view of the fact that nothing whatsoever was made of it at the trial.

In cross examination the following question was put to the witness: "In answer to a question, I do not know who was wrong in the accident. But here you are saying the other car swerved onto your lane but in your statement you were not sure?" To that rather confused question he returned the answer "Because when the police asked me who was wrong I could not say so because its up to the police or Judge to say." Earlier in his evidence he had said that he was sure that they - that is himself and the driver of the car - were travelling in their own lane. In re-examination he said that Tan (i.e. the driver) could not have avoided the collision because it was all so sudden. He was then asked by the Court whether any attempt had been made by the driver of his car to pull the car to one side and he answered "No because the other car that came in was so sudden. There was no time to react."

The only other evidence of importance in the case was that given by certain police officers and fire brigade officer who had visited the scene shortly after the accident and had, in the usual way, made measurements and drawn a sketch and observed and noted the debris, principally broken glass, and its position on the road. An oil patch was observed which obviously had come from one of the cars and this was made the subject of cross examination without however any illumination being derived from it in relation to the manner in which the accident had come about.

A police photographer had also taken photographs of the two cars, after they had been moved to opposite sides of the road in order to free the passage of traffic. The fire brigade officer who visited the scene said that when he arrived he found that the cars were blocking the road and it was thereafter that the police removed them to the side. It is somewhat unfortunate that no photographs seem to have been taken of the cars in their final position of rest immediately after the accident. Nor would it appear that the sketch which was made reflects that situation since the roughly drawn rectangles indicating on the sketch the position of the two cars would seem to show that by the time the sketch was made they had already been dragged to opposite side of the road. The same witness on recall could only say in answer to the question:

Q : Were the cars moved after the sketch plan was drawn by the police?

A : Usually, after the police completed the investigation only then can the car be moved.

There is thus some degree of confusion on the evidence on this particular point. In the event that is not of great significance since the Magistrate has made no findings in respect of the relative position of the two cars immediately after impact. Further, although he does say that in case of traffic accidents such things as sketch plans, brake marks, oil spills, position of glass, photographs etc. can provide vital clues in determining how an accident occurred and are capable of affording corroborative evidence he clearly has not resorted to any save one of the items which he mentions in deciding whether or not they did afford corroborative material for Sia's and Tan's violence. He does place reliance on the fact that the photographic evidence and damage reports indicate that the major damage to the deceased's car was to the right of the front part of the vehicle, and that to the car of the accused was to the left of the front part of his car. It can be said that the photographic

evidence does indeed support this finding. He took this as constituting, in itself, evidence that it was the accused and not the deceased who had swerved across the middle line of the road. While such evidence might not in every case constitute an infallible guide to the manner in which an accident has occured, here, in my view, it does give significant support to the account given by Sia and Tan and I think that the Magistrate was justified in finding that it negatived the defendant's contention that it was the deceased who swerved into his car.

In the end however, the question of guilt or innocence rested primarily upon the credibility of the two principal prosecution witnesses. I have taken into account, and it is a matter of some substance, Mr. Sim's pertinent observation as to the possible motive which could have impelled Sia to lie brazenly. He reminds me of the maxim that "Hell hath no fury like a woman scorned." It is true that Sia kept silent for two years without seeking to purge her conscience and only sought out the lawyer immediately after discovering that the defendant had another lady friend and that she went to the lawyer shortly before the commencement of the criminal trial.

As for Gregory Tan, despite the fact that it was only in giving evidence in Court that he positively affirmed that the other car had encroached upon the lane in which he and his companions were travelling, yet in his second statement to the police some three months after the accident, he said, as he was later to say in Court, that he was not paying close attention to the approach of the oncoming car and that that car and his own were travelling in their proper lanes. He then went on to add that the intensity of the headlights was brighter than usual immediately before the collision and that he caught to this change out of the corner of his eyes. That description accords well with the idea of an instantaneous perception of a very sudden and alarming alteration in the approach of the other car such as one would expect in the case of a sudden and dangerous swerve on the part of that car.

This was pre-eminently a case in which the impression of the witnesses by the sitting Magistrate was of primary importance. It may be that in going to see the lawyer Sia was impelled in some degree by jealous anger. Of itself that would not mean necessarily that what she then said was not the truth. Prior to the discovery that she had a rival her relationship with the appellant had continued and was satisfactory enough to encourage two visits to him in Hong Kong. It may be said that until the discovery of her rival she thus has a motive for not telling the truth to the police. I have given anxious consideration to the points carefully and clearly put before me by Mr Sim. In the end I am not persuaded that the Magistrate was mistaken, and the appeal against conviction must be dismissed. At the hearing Mr Sim conceded that on the Magistrate's finding of deliberate action on the appellant's part the sentence of 5 months was very lenient. On the dismissal of the appeal against conviction the appellant again asked for a non-custodial sentence. But there is no room on the evidence here for any alternative finding of negligence or momentary mistake, such as might justify a non-custodial sentence and that appeal too must be dismissed.